No. 85-656

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

SECRETARY OF STATE OF THE STATE OF WASHINGTON, RALPH MUNRO,

Appellant,

v.

SOCIALIST WORKERS PARTY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

Is the State of Washington's statutory requirement that a candidate for partisan office must receive 1% of the votes cast for that office in the primary election[1] in order to remain on the general election ballot a violation of the First and Fourteenth Amendments to the United States Constitution?

PARTIES

Appellant Ralph Munro is the Secretary of State of the State of Washington and the chief election officer of that State.

Appellees are the Socialist Workers' Party; Dean Peoples, who in the 1983 primary election was a candidate of that party for the United States Senate; Louise Pittell, a registered voter; and LeRoy Watson, a registered voter and a member of the Socialist Workers' Party.

[1]Washington has a "blanket primary", in which each primary ballot includes all candidates, and each voter may vote for candidates irrespective of party affiliation. There is no party registration of voters in Washington.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 765 F.2d 1417 (1985), and is reproduced as J.S. App. A. The Circuit Court judgment is reproduced as J.S. App. B.

The Findings, Conclusions of Law and Order of the United States District Court, Western District of Washington are unreported and are reproduced as J.S. App. C. The Summary Judgment of that Court is reproduced as J.S. App. D.

JURISDICTION

Jurisdiction of this Court is invoked by appeal pursuant to 29 U.S.C. 1254(2). This appeal was taken from a

judgment of the Court of Appeals for the Ninth Circuit which held unconstitutional a Washington state election statute as applied to statewide elective offices.

The Appeal was filed on October 8, 1985 (J.S. App. E). The Jurisdictional Statement was filed on October 15, 1985. Both were timely filed.

On January 13, 1986, this Court noted probable jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 4 of the United States Constitution:

> § 4 ELECTION OF SENATORS AND REPRESENTATIVES. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; * * *

First Amendment of the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacibly to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, § 1 of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Rev. Code § 29.18.110 reads as follows:

> No name of a candidate for a partisan office shall appear on the general election ballot unless he receives a number of votes equal to at least one percent of the total number cast for all candidates for the position sought: *Provided*, That only the name of the candidate who receives a plurality of the votes cast for the candidates of his party for any office shall appear on the general election ballot.

STATEMENT OF THE CASE

A. History of the Litigation

Washington State election laws provide for the filings of declarations of candidacy in the third week of July of each election year. Any qualified voter can file for office as a candidate of a major party.[2] Persons desiring to be elected as a minor party or independent candidate must be nominated by a convention held during the July filing week and obtain the requisite signatures on a nominating petition. When this litigation was commenced, 178 signatures were required for a statewide office, which number was based on the 1980 presidential election.[3]

All candidates for partisan office, whether of a major or minor party, are included on the state primary election ballot in the third week of September. Thereafter, a candidate who receives the plurality of the votes cast for the candidates of each party and who also receives at least 1% of the total votes cast in the primary for that office then appears on the November final election ballot.

Following the untimely death of a U.S. Senator on September 1, 1983, the Legislature authorized a special primary election for October 11, with the final election to occur on November 8, 1983. The appellee, Dean Peoples, qualified and was included in the primary election ballot for that office on October 11, in addition to 32 other candidates, viz; 18 Democrats and 14 Republicans. In that primary election, 681,690 votes were cast for the office of U.S. Senator, and appellee Peoples received 596 votes. That being fewer than the 1% requirement of RCW § 29.18.110, i.e., 6,817; he was statutorily not eligible to appear on the general election ballot scheduled for November 8.

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[2] A "major party" is a party, one of whom's candidates received at least 5% of the total votes cast for any statewide office in the previous general election. Wash. Rev. Code § 29.01.090.

[3] There has not been any challenge to this requirement, with which minor parties must comply to obtain access to the primary election ballot.

This action was instituted in the Federal District Court for Western District of Washington on October 18, 1983 seeking declaratory and injunctive relief. (J.A. 1). Plaintiffs sought by preliminary injunction to require that the plaintiff Dean Peoples be included on the November 8, 1983 final election ballot for United States Senator. After hearing, the preliminary injunction requested was denied, in part because election plans, such as absentee ballot printing and distribution had already commenced. (Transcript 10-26-83. No order was ever formally entered.

Subsequently, on January 12, 1984, the matter came before the District Court on cross motions for summary judgment. (J.A. 10, 59) The Court entered Findings of Fact, Conclusions of Law and Order upholding the statutory 1% requirement. (J.S. App. C)

A timely appeal was taken to the Ninth Circuit Court of Appeals which heard argument and received a Supplement to the Record setting forth the success of minor party and independent candidates in the subsequent 1984 primary and general elections. (J.S. 145)

The Ninth Circuit held the 1% vote requirement of Wash. Rev. Code § 29.18.110 for appearing on the final election ballot to be unconstitutional as applied to statewide elective offices. That Court found the statute, as applied to statewide elective offices, violated the First and Fourteenth Amendments. (J.S. App. A)

Washington filed an appeal October 8, 1985. (J.S. App. E). A Jurisdictional Statement was filed with this Court (October 15, 1985). The Socialist Workers moved to dismiss or affirm (December 15, 1985).

On January 13, 1986, probable jurisdiction was noted.

B. **The Washington Election System**

Washington's election system has no provision for registration or other identification of voters by party.[4] Candidates for partisan office simply identify themselves as being affiliated with the political party of their choice. Candidates for those offices directly file for their desired

[4]The "membership" in the party referred to *infra*, is neither state sanctioned nor required; it is a voluntary matter between party and voter.

office and no party approval is required for filing under the banner of a "major political party." A "major political party" is a party which had any candidate for any statewide office receive 5% of the vote in the last general election. (Wash. Rev. Code § 29.01.090). Such major party candidates are automatically placed on the primary ballot (Wash. Rev. Code § 29.18.020).

Persons desiring to be candidates not under the banner of major parties, but rather under the banner of a minor party or as an independent, are nominated through a "party convention" which is "an assemblage of registered voters." (Wash. Rev. Code § 29.24.010). Those conventions are held the same week that the filings of candidacy for office are made. (Wash. Rev. Code § 29.24.020).

The "convention" requirement is not a separate organizational requirement, as indicated by the nomination of Peoples, which was a "*street corner convention*". (Dist. Ct. FOF, J.S. App. C-3). A required nominating petition, (convention "certificate") must have voter signatures equal to 0.01% of the voters who voted in the last presidential election in the jurisdiction with a minimum of twenty-five voter signatures. (Wash. Rev. Code § 29.24.030). A candidate for a statewide office in 1983, when this litigation was commenced, needed 178 voter signatures on the "certificate of nomination."

All candidates for partisan offices, be they of major parties or others, appear on the September primary ballot. Washington has a "blanket primary" in which voters may vote for their choice of any candidate, regardless of political affiliation and without a declaration of political adherence on the part of the voter. (Wash. Rev. Code § 29.18.200). For example, the voter may vote for a Socialist Workers' candidate for one office, a Republican for another, a Democrat for a third and so forth through the primary election ballot.

The Washington primary is later than many states, being held on the third Tuesday in September. (Wash. Rev. Code § 29.13.070). And the general election is held on the first Tuesday after the first Monday in November. (Wash. Rev. Code § 29.13.010).

To appear on the general election ballot for a partisan office, a candidate must out poll any other candidates of the same party and receive at least 1% of the votes cast for that office in the primary. (Wash. Rev. Code § 29.18.110). In the general election, write-in voting is allowed for any candidates other than those who lost a primary contest. (Wash. Rev. Code § 29.51.170.)[5]

It is the 1% qualifying provision which was challenged in this action. Before 1977, minor party candidates were nominated by conventions held the same day as the primary. Voters attending conventions were not allowed to vote in the primary (Prior Wash. Rev. Code § 29.24.040).[6] One hundred voters or ten voters per congressional district[7] were required to nominate (Prior Wash. Rev. Code § 29.24.030). The requirement to remain on the general election ballot was then 5% of the votes cast in the primary (Prior Wash. Rev. Code § 29.18.110). The 5% requirement applied only to "major party" nominees since minor parties and independents were not included on the primary ballot.

The Washington legislation in 1977 made changes in the election laws which included the process for minor parties. (chapter 329, Laws of 1977, 1st Ex. Session).

The convention for minor party/independent nominations was rescheduled from the day of the primary to the Saturday before the filing period. The prohibition of minor party convention nominators voting in the primary was removed. The number of voter signatures required for a nomination petition was changed from 100, to one signature for each 10,000 votes cast in the preceding presiden-

[5]The Court of Appeals' confusion on this issue, (J.S. App. A-5) is resolved by Washington's interpretation of this inartfully worded statute as a "sore losers" statute; only votes for a candidate who sought nomination and lost to another candidate are not to be counted. Write-in votes for a candidate who did not appear on the general election ballot because of failure to reach the 1% in the primary *are* counted.

[6]A lawsuit challenging this disqualification of minor party convention participants from voting in the primary was pending at the time of the 1977 amendments (J.A. 77). *See American Constitutional Party v. Munro*, 650 F.2d 184 (Ninth Circ. 1981).

[7]At that time Washington had seven congressional districts.

tial election. Minor party and independent candidates were added to the primary ballot. Finally, the requirement that a candidate must receive at least 5% of the primary votes for the office to remain on the general election ballot was reduced to 1%.

C. Minor Party and Independent Candidate Nominations in Washington

The relevance of the historical participation levels shall be discussed *infra*. The following summarizes the participation of the minor parties and independents in Washington.

The first table gives the total number of minor party and independent nominations. These numbers in the first column reflect the number of convention petitions filed with the Secretary of State. They are *not* the number of candidates since some qualifying parties have multiple candidates. (See Table 2 for candidates) Column 2 shows how many minor parties participated. (Independents have been subtracted). After 1977, this column is divided to show the number of minor parties on the primary and general election ballot.

TABLE I

	Minor Party/ Independent Petitions Filed	Minor Parties Represented in Election	
		Primary	General
1968	6		6
1970	4		4
1972	7		7
1974	9		9
1976	10		10
1978	6	4	3
1980	5	4	3
1982	8	4	3
1984	10	5	5

(J.A. 79 and State of Washington Abstract of Votes, Office of the Secretary of State)

All of the nominations listed in the first column resulted in placement of one or more candidates on the Washington ballot. After 1977, a place was guaranteed on

the primary election ballot, rather than on the general election ballot. To remain on the ballot for the general election, each *candidate* must now satisfy the 1% requirement.

In 1976, the year immediately preceding the adoption of the 1% requirement, the following 12 parties qualified and appeared on the Washington ballot (alphabetical):

1. American Independent
2. Bicentennial Reality
3. Communist
4. Democrat
5. Free Peoples'
6. Independent
7. Libertarian
8. OWL
9. Republican
10. Socialist Labor
11. Socialist Workers
12. U.S. Labor

The 1976 Washington election had the largest number of parties in history. It should also be noted that one party fielding a full "slate" of candidates for statewide office was avowedly frivolous; OWL was an acronym for the "Out With Logic Party".

The following summarizes the primary and general ballot participation of parties and candidates subject to the 1% requirement since the 1977 changes.[8] These numbers include county offices, state offices and U.S. Representatives and Senators:

TABLE II

	September Primary/ Minor Party Candidates	September Primary/ Independent Candidates	November General/ Minor Party Candidates	November General/ Independent Candidates
1978	12	2	8	2
1980*	11	2	8	2
1982	13	5	12	5
1984*	11	5	9	4

State of Washington, Abstract of Votes — *The 1980 and 1984 figures do not include Presidential candidates who only appear on the November general election ballot. In 1980 there were nine presidential candidates and ten in 1984.

[8]A supplement to the record was filed in the Circuit Court before argument giving the 1984 election figures.

In the 1984 election in Washington, the Socialist Workers' Party had candidates for President/Vice-President. Additionally, that party had two candidates in the primary for other offices; one for the U.S. House of Representatives, who qualified for general election ballot, and the other for Governor, did not. (J.A. 146).

In that same election, besides the two major parties, there were sixteen minor party and independent candidates on the September primary which included candidates from five minor parties. Of those candidates, the thirteen who qualified for the general election included representatives of all five minor parties. The three who did not achieve the 1% necessary to qualify for the general election were all candidates for Governor. Two candidates appeared on the general election ballot for statewide office, one being a minor party candidate and the other an independent. (J.A. 146).

SUMMARY OF ARGUMENT

In Washington, the primary election is:

> "* * * not merely an exercise or warm-up for the general election, but an integral part of the entire election process, the initial stage in a two-stage process in which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates."

Storer v. Brown, 415 U.S. 724 at 735 (1974) (describing the California primary).

The basic complaint of the Socialist Workers Party is that the Washington election system allows the voters to winnow out and reject a party's candidate in the primary election, with the result that unless its candidate receives a minimal qualifying vote in the primary there is no second chance in the general.

Thus there is a critical difference between this case and the previous ballot-access cases which have been before this Court — a difference which makes this case much easier. The previous cases have involved statutory qualifications which would keep a minor party or independent

candidate from appearing on the ballot at all. Unless those qualifications were met, the candidate would never appear on a ballot and the electorate would have no chance to accept or reject the candidate at the ballot box.

Here, however, the minor party or independent candidate faces no appreciable obstacle to appearing on the ballot at all. The candidate need only be nominated by a convention attended by a handful of voters — less than 200. That places the candidate on the ballot for the primary election, at which the voters can either accept or reject the candidate. If, however, the candidate is overwhelmingly rejected, i.e., receiving less than 1% of the total vote cast for that office in the primary, the candidate does not remain on the ballot for the general election. Unless a write-in campaign is mounted, there is no second chance to have voters express their approval or disapproval. For such a candidate who has been winnowed out by the voters, the election is over.

Thus, the difference between this case and previous cases is that here the candidate has already had a chance to take his message to the voters, in a primary election, and the question is whether there is constitutionally required a second chance to continue into the general. In the previous cases, failure to meet the statutory qualifications meant that there would be no chance at all to submit a candidacy to the voters.

This difference is important because of the nature of the constitutional interests which underlie this case. Those interests are based upon the interests of the electorate in having a robust and open debate on public issues, and a wide range of choice among candidates and the positions those candidates represent. *Anderson v. Celebrezze*, 460 U.S. 780 at 794 (1983). Closely related is the interest of the electorate in not allowing existing or "major" parties to monopolize the election process. *Ibid.* Washington's election system does not significantly impair those interests in any way. A new or minor party nominates by a convention attended by a minimal number of voters. In Washington a political party can qualify as a "major party" by obtaining 5% of the vote cast for a statewide office. Washington simply says that for those candidates who have been overwhelmingly rejected in the primary ballot, placement is not available in the general election, though write in is still possible.

Further, we do not rely solely upon this difference between Washington's system and those involved in previous cases. For even if the right of minor party and independent candidates under Washington law to gain almost automatic access to the primary ballot be set aside as constitutionally irrelevant, Washington's system would still pass constitutional muster under this Court's previous decisions. As those decisions make clear, the state has a right to require "* * * some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot * * *" *Jenness v. Fortson*, 403 U.S. 432, at 442 (1971). And the 1% requirement which Washington's system uses to measure that modicum of support is well within the numerical requirements upheld by this Court in *Jenness, supra*, and *American Party of Texas v. White*, 415 U.S. 767 (1974).

More is involved, however, than just a comparison of numerical requirements. We must also answer, in the context of Washington's system, the question raised in *Storer v. Brown, supra*: Could a "reasonably diligent" independent or minor party candidate be expected to meet those requirements? Or will it be only rarely that such a candidate will get on the ballot? *See Storer, supra*, at 415 U.S. at 742. To place a candidate on the primary ballot in Washington, of course, hardly any diligence is required at all; the candidate needs only a handful of voters — less than 200 — to attend the nominating convention. And even for the general election ballot, a reasonably diligent candidate, with a reasonably appealing campaign, can surely meet Washington's 1% requirement, as the history of minor party and independent candidates shows.

It must be recognized, however, that no matter how diligent a party or its candidate might be, that candidate can still be overwhelmingly rejected, simply because the voters find no merit in the political positions espoused by that party or candidate. The "reasonable diligence" stand-

ard, in short, should not be applied in a manner which eliminates a state's right to require a "modicum of support." *Jenness v. Fortson, supra,* 403 U.S. at 442. While reasonable diligence will assure that political positions are heard by a large group of voters, it will not always assure that these positions will be accepted.

ARGUMENT

A. Framework of Analysis.

Before examining the constitutionality of the specific electoral system here under challenge, we believe it useful to delineate the constitutional interests implicated by that challenge. Precisely whose constitutional interests are here involved? And, what are the nature and scope of those interests?

The answers to these questions will provide the necessary framework for our analysis of Washington's election system and for a determination as to whether that system should pass constitutional muster.

The State's Interest in Regulating Elections

The states have the constitutional authority and responsibility to conduct elections, including those for federal offices. *U.S. v. Gradwell,* 243 U.S. 476 at 484 (1916). Because of this responsibility, "it is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal", as this Court has previously recognized. *Rosario v. Rockefeller,* 410 U.S. 752 at 761. For the states to achieve that goal requires establishment of comprehensive election systems. Thus, in *Anderson* the Court recognized:

> * * * as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and have some sort of order, rather than chaos, in order to accompany the democratic process.
>
> (Citing *Storer v. Brown,* 415 U.S. 724 at 730).

In order to prevent the chaos and the consequent frustration of the democratic process which would result if any and all comers were able to place themselves on the

ballot, this authority of the states to regulate elections includes the power to place certain limits on ballot length and on candidate access.

> The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not.
>
> *Lubin v. Panish,* 415 U.S. 709 at 715 (1974).

As this language suggests, different states may provide quite different tests for determining the "seriousness" of political candidates. They may hold different views, as expressed in their election laws, as to what is a "reasonably" sized ballot, and what is a "reasonable" level of public support to be required to gain a place on the ballot. Such diversity of judgment by various states is but another manifestation of the wide diversity inherent in our federal system. And the remark made by this Court in a case upholding Puerto Rico's somewhat unusual system of filling vacancies to its legislature is applicable here:

> Puerto Rico, like a state, is an autonomous political entity sovereign over matters not ruled by the Constitution [citations omitted]. The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference.
>
> *Rivera-Rodriguez v. Popular Democratic Party,* 457 U.S. 1 at 8 (1982).

Stated even stronger:

> * * * absent some clear constitutional limitation, Puerto Rico is free to structure its political system to meet its special concerns and political circumstances.
>
> *Rivera-Rodriguez, supra,* 457 U.S. at 13, 14.[9]

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[9]The court below noted that "[o]nly Washington employs the primary device to screen minor party candidates from the ballot." (J. S. A-8). The court seems to have treated this uniqueness as reason for viewing Washington's system as questionable, contrary to federal principles of allowing or encouraging variation between states. Also, a prior decision upholding a primary vote qualifying system, was summarily affirmed by this Court. *Hudler v. Austin,* 419 F. Supp. 1002 (E. D. Mich. 1976), summarily aff'd. sub nominum *Allen v. Austin,* 403 U.S. 924 (1977).

The flexibility and diversity afforded the states under our constitutional system unquestionably has, as recognized in *Rivera-Rodriguez* itself, certain limits. We shall examine subsequently where the Court has drawn the lines in applying those limits. See pp. 14-17, 19-21, *infra*. But before doing so, it is necessary to examine a more fundamental question, viz. the source of those limits, and the nature of the other constitutional interests which come into play.

The Voters' Interest In Associating For Political Purposes And In Having Candidates Of Their Choice.

In *Bullock v. Carter*, 405 U.S. 134 (1972), this Court struck down, as excessive, certain filing fees required to be paid, under Texas law, by a candidate in a primary election. In explaining the grounds for its decision, the Court addressed a threshold question which is of direct importance here. In determining the constitutionality of a state law which restricts access to the ballot, should the focus be upon the interests of the candidate? Or should it instead be upon the interests of those who might wish to vote for him? The Court stated:

> The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review. *McDonald v. Board of Election*, 394 U.S. 802 (1969). Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast. Rather, the Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose. The existence of such barriers does not of itself compel close scrutiny. Compare *Jenness v. Fortson*, 403 U.S. 431 (1971) with *Williams v. Rhodes*, 393 U.S. 23 (1968). In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.

Bullock supra 405 U.S. at 142-143.

Accordingly, in keeping with the flexibility which the states enjoy in fashioning their election systems, restrictions upon a candidate's access to the election ballot do not automatically trigger the stringent "strict scrutiny" standard of review. Only when, as in *Williams v. Rhodes*, 393 U.S. 23 (1968), the election system erects a virtual bar between the minor party and the ballot box, and gives the minor party no reasonable chance at all to gain access to the ballot, is strict scrutiny to be applied.

Moreover, in examining those constitutional interests, the focus should be upon the interests of the voters themselves, rather than the interests of the individual candidates.

In *Williams supra*, the Court identified those interests as the right of voters to associate for political purposes by forming a party and the right to vote effectively:

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

393 U.S. at 31.

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court explained further the nature of these rights:

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties. *Clements v. Fashing, supra*, at 964-965 (plurality opinion). By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group,

such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new program; many of their challenges to the status quo have in time made their way into the political mainstream. *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. at 186; *Sweezy v. New Hampshire*, 440 U.S. at 186; *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957) (Opinion of Warren, C.J.).

In short, the primary values protected by the First Amendment—'*a profound national commitment* to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)—are served when election campaigns are not monopolized by the existing political parties. (Emphasis supplied).

Anderson thus sheds light on a critical question raised but unanswered by *Williams*. Surely, under *Anderson*, the right to vote does not mean that any candidate supported by a single voter has a constitutional guarantee of access to the ballot. So also, the right to associate for political purposes, by forming a party, surely does not mean that every party, no matter how small, must be given a similar guarantee. For this would lead to the very chaos and confusion which the State has a responsibility to prevent. See p. 12, *supra*. *Jenness v. Fortson*, 403 U.S. 432 (1971) and *American Party v. White*, 415 U.S. 767 (1974) confirm that *Williams* does not require any such result. But what constitutional interests should be looked to in drawing the line? *Anderson*, we suggest, tells us: The constitutional interests are predicated upon a full debate on public issues, and prevention of a monopoly by the existing political parties. Only when a State's election system seriously impinges upon these interests does it move into the danger zone.

Anderson similarly sheds light on the critical question here as well. In 1977, Washington decided to replace the virtually automatic access to the general election ballot which minor party and independent candidates had previously enjoyed. It decided that such candidates must now

make a showing of a "modicum of support" in the primary, in order to remain on the ballot in the general. *Jenness v. Fortson*, *supra*, 403 U.S. at 442. Virtually automatic access to the voters remained, through the primary election ballot.

Washington's decision, we shall next show, cannot realistically be viewed as seriously impinging upon the rights identified in *Williams supra*, and elaborated upon in *Anderson supra*. Rather, that decision represents an exercise of the flexibility which states constitutionally enjoy in fashioning their election systems.

B. Washington's System Does Not Impair Any Constitutionally Protected Interests. The Importance of Virtually Guaranteed Access To the Primary.

This case arose only after the Socialist Workers Party and its candidate, Mr. Peoples, had already appeared on the election ballot in Washington. All who wished to vote for him and his party had their chance to do so, and to vote against the two major parties. The total of those who voted for Mr. Peoples was less than a tenth of 1% of the total vote for the office which he was seeking, i.e., 596 out of 681,690 votes.

Exactly what accounts for this dramatically poor showing can only be surmised. One factor may have been that only $1,900 was spent on his campaign. (J. A. 30). Even in Washington, this is a miniscule amount for a statewide race for the U.S. Senate. And if it is indicative of the overall level of effort made in the campaign by the party and its candidate, the poor showing is not surprising.

Mr. Peoples thus did not even come close to the approximately 6,817 votes which he needed under the 1% requirement. And in evaluating that requirement, as applied to him and to all other minor party and independent candidates, it must be remembered that under Washington's unique system of a blanket primary, the primary is a political free-for-all. Indeed, the 1% requirement would be more difficult to meet without a blanket primary. But Washington has a blanket primary in which the voter can

switch parties for each different candidate on the primary ballot, thus, the voter can vote for a Republican candidate for the United States Senate, a Democratic candidate for the House of Representatives, an independent or minor party candidate for Governor, and back and forth, all the way down the ballot. This means, as a practical matter, that it is open to minor party and independent candidates to attract the votes of those who wish to vote for major party candidates for other offices. This is particularly important for minor parties who do not field a full slate of candidates for all offices. One can vote for their candidates, without foregoing the opportunity to vote for a candidate for every office.

Most importantly, the "free-for-all" character of Washington's blanket primary means that the major parties are not given any sort of monopoly. During the primary campaigns, minor parties and independent candidates have a wide-open opportunity to present their ideas to the voters, to engage in a robust, uninhibited public debate, and thus to win voter support on election day. In this manner, Washington's system fully preserves the important constitutional interests that are here at stake.

For this reason also, the case at bar is much easier than such prior cases as *Williams v. Rhodes*, 393 U.S. 23 (1968), *Jenness v. Fortson*, 403 U.S. 431 (1971), *Storer v. Brown*, 415 U.S. 724 (1974), and *American Party v. White*, 415 U.S. 767 (1974). Each of those cases involved a requirement that a certain number of voters sign nominating petitions before a minor party or candidate could be placed on the ballot at all. Without that initial voter support, the party or candidate would not appear on any ballot, and the voters would have no chance on election day to make a decision about that party or candidate. Here, however, only a handful of voters—less than 200—are needed to place the minor party or independent candidate on the primary ballot, and to give them access to the political fray.

Indeed, despite a superficial similarity, the claims of the minor parties and candidates in those previous cases are really quite different from the claim of the Appellees

here. The Appellees claim a right to have access to the general election ballot, even though their party and candidate have been overwhelmingly rejected by the voters in the primary. They are essentially complaining about a requirement that they face the voters in the primary and win a certain degree—1%—of the voters' support in order to face them again in the general. In a sense, their complaint is not about lack of access to the voters, but about a requirement of too much access. They wish to face the voters only once, and thus avoid the risk of initial rejection.

But even if the right, under Washington's system of virtually guaranteed access to the primary be set aside as irrelevant, and if the focus is only upon the right of access to the general election, Washington's system still meets the requirements established under this Court's prior decisions.

C. The Reasonableness of Washington's Requirement for Access to the General Election.

In Washington's integrated two-step election process, access to the second step, the general election, by minor party and independent candidates is less restrictive than under systems previously validated by this Court. In *Jenness v. Fortson*, 403 U.S. 431 (1971), the Court rejected a challenge to Georgia's election system under which ballot access was denied to independent candidates unless they filed a petition signed by at least 5% of the number of voters registered in the previous election.[10] The Court observed that "Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." 403 U.S. at 439. And in upholding Georgia's system, the Court did not apply the "strict scrutiny" test,

[10] The federal statutory requirement for access to campaign financing upheld by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), chose the same 5% requirement in drawing the line between "new" and "minor" parties, of which only the latter would be entitled to public funding. This Court upheld that determination, analogizing it to the state's ability to limit the ballot to candidates with "demonstrable public support." 424 U.S. at 96. Such a limit served to avoid "facilitating hopeless candidates," 424 U.S. at 96, n. 129. This Court again recognized the "important public interest against providing artificial incentives to splintered parties and unrestrained factionalism." 424 U.S. at 96.

but rather a less stringent standard of review. As we have previously observed, at pp. 14, *supra*, the Court in *Bullock v. Carter*, 405 U.S. 134 (1972), expressly recognized that this less stringent standard was applied in *Jenness*.

Similarly, in *American Party v. White*, 415 U.S. 767 (1974), the Court rejected a challenge to a Texas election system under which any political party would be denied ballot access unless it either obtained 2% of the vote in the previous general election, or filed petitions signed by a number of registered voters equal to 1% of the total votes cast in that prior election.

The requirements of *Jenness* and *American Party* are more stringent than the 1% requirement challenged here, as can be shown by the following table. The various bases to which we apply the various percentages in that table are taken from Washington's 1984 election figures.

Total Washington Voters	Washington/ General Vote For Governor	Washington/ Primary Vote for Governor	Nomination Signatures for Governor to Appear on primary election
2,457,667	1,888,987	914,000	178* petition signatures
x 5% Approved in Jenness	x 1% Approved in American Party	x 1% (invalidated by court below)	
94,449 petition signatures	18,890 petition signatures	9,140 primary votes	

*This is based upon the 1980 vote, in 1988 194 signatures will be required as the 1984 vote cast increased over the 1980 total.

As this table shows, there are variations between the three systems with respect to the "pool" to which the particular percentage is applied. Under a *Jenness* type of system, it is the total number of registered voters; under an *American Party* system, it is the total votes cast for an office in a previous general election; and in Washington's system, it is the total votes cast for an office in the immediately proceeding primary. Washington's percentage is applied to the lowest of these three pools, i.e., the actual number of votes cast in the primary. As one would expect,

the primary turnout is less than that in the general. There is also a "fall off" as one moves down the ballot, so the number of votes for other statewide offices is even less.[11]

We do not rely, however, on just a comparison of various numerical requirements. One must examine other features of the system, to see if they unduly impede a minor party or independent candidate from remaining on the general election ballot. *See Williams v. Rhodes*, 393 U.S. 23 at 34 (1968). The Court should examine the "totality" of applicable election laws "taken as a whole."

We have already discussed, at pp. 17-18, *supra*, the fact that under Washington's unusual blanket primary system, the voter declares no party affiliation. Unlike the voter in the usual "closed" or "open" primary, one can switch parties, office by office, down the whole primary ballot. Thus every voter who goes to the polls in a primary election can be effectively appealed to by the minor party or independent candidate, with no risk that by supporting such candidates, the voter will give up the right to vote for candidates for other offices.

Another important factor in evaluating the system, of course, is the matter of deadlines. While the degree of voter support required by the system might be entirely reasonable, the time period for garnering that support might not. *Cf., Mandel v. Bradley*, 432 U.S. 173 (1977).

In Washington, the filing deadlines for minor party and independent candidates are approximately the same as for major party candidates; they are within the same week. *See* p. 5, *supra*. All candidates thus have from the third week in July until the third week in September in which to campaign for support. And indeed, there is no reason why they cannot start will before then, if they so wish. Washington's system thus imposes no unrealistic or unreasonable deadlines.

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[11] We are not here suggesting, of course, that the task of the candidate or party becomes actually easier as the base diminishes. For the pool of voters from which that 1% requirement must be met is diminishing too, as noted by the court below. (See J.S. A-8) But what that court failed to recognize is that the diminishing bases cuts two ways, not just one way.

The court below, however, faulted Washington's system in this regard. It emphasized that "* * * a primary vote system for a minor party nominee has the inherent effect of establishing a relatively early deadline," thereby preventing independent-minded voters from basing their choice on subsequent events. (J.S. A-8.) But this completely overlooks the fact that the deadlines for gathering signatures under the Georgia and Texas systems involved in *Jenness* and *American Party, supra,* were much *earlier* than the deadline established by Washington's primary election. In *Jenness,* the deadline was the second Wednesday in June. See 403 U.S. at 434, 435. In *American Party,* it was the 30th of June. See 415 U.S. at 778. In Washington, the 1% vote requirement occurs on the third Tuesday of *September.*

Lastly, we ask: What has been the effect of Washington's system on minor party and independent candidates? The results are found in Tables I and II, pp. 7 and 8, *supra.* While these results show, in our view, no precise pattern, some general conclusions seem warranted. First, the 1977 change appears to have reduced the wide proliferation of minor party participation in November general elections, as exemplified by the 10 minor parties appearing on the 1976 general election ballot. (See column 3 of Table I.) And this is probably as the legislature intended. In terms of numbers of minor party *candidates,* there is wide participation in both the September primary and November general elections. After the 1977 change, the number of minor party candidates appearing on the November general election ballot ranged from a minimum of 8 to a maximum of 12. (See column 3 of Table II, p. 8, *supra.*) And additionally, independent candidates ranged from a minimum of 2 to a maximum of 5. (See column 4 of Table II.)

To be sure, most of these candidates were running for positions which are elected in less than statewide areas. For statewide offices, minor party candidates have not done well since 1977. (See J.A. 79.) For offices which are not statewide, such as for Congress, the State legislature, and positions in local governments, the minor parties seem to have no difficulties in reaching the general.

What accounts for this difference we can only surmise. It would not be unreasonable to expect the strength of minor parties to be locally based. One might expect, for example, that the Socialist Workers Party would find broader appeal in the metropolitan Seattle area than in the farm communities of Eastern Washington. And, in fact, the Seattle area is where the party concentrated its limited efforts in 1983. (See J.A. 30-58).

But whatever the reason for the difference, the success of minor party candidates in these non-statewide primary elections surely suggests that a lack of diligence and a lack of an appealing message is the real root of the problem in statewide races. And in any event, there is simply no rational basis for the result reached by the court below, viz., the creation of a two-tiered system for local and statewide elections under which the 1% requirement is applicable to local races, but not to statewide races. If minor parties tend to focus their efforts on local, rather than statewide races, as seems to be the case, that certainly provides no constitutionally compelling reason for invalidating the 1% requirement for statewide races.

CONCLUSION

For the reasons given above, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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